GUIDO RAHR

IBLA 97-511 Decided April 20, 1998

Appeal from a decision of the Acting Area Manager, Great Falls (Montana) Resource Area, Bureau of Land Management, denying a protest of the North of Black Canyon Selective Timber Sale. EA MT-067-97-001; EA MT-067-97-001R.

Affirmed.

1. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Timber Sales and Disposals

   It is proper for BLM to deny a protest of a proposed timber sale if, in the course of its environmental review, it has fully considered the probable site specific and cumulative environmental impacts and a reasonable range of alternatives and has concluded that there will be no significant environmental impact.

2. Contests and Protests: Generally--Rules of Practice: Appeals: Statement of Reasons--Timber Sales and Disposals

   A decision by BLM denying a protest of a timber sale may be affirmed where the statement of reasons filed in support of an appeal merely repeats, with little change, arguments raised in the protest and fails to present any new issues or point out any error in the decision appealed from, and the BLM decision is comprehensive and addresses the arguments contained in the protest.

APPEARANCES: Robert M. Knight, Esq., and Sara J. Johnson, Esq., Knight, Masar and Poore, PLLP, Missoula, Montana for Appellant; John C. Chaffin, Esq., Billings Field Office, Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Guido Rahr (Rahr or Appellant) has appealed from a July 2, 1997, Decision of the Acting Area Manager, Great Falls (Montana) Resource Area, denying Rahr's protest of a May 27, 1997, BLM Decision approving the North of Black Canyon Selective Timber Sale. The BLM had earlier issued a Decision denying Appellant's protest on June 20, 1997, but issued a clarified determination on July 2, 1997, which reaffirmed the reasons for denial of the protest detailed in the June 20, 1997, Decision and named Louisiana-Pacific Corporation as an adverse party. The July 2, 1997, clarification Decision added that BLM would proceed to harvest the timber as described in Environmental Assessment (EA) MT-067-97-001. The BLM noted that "[d]ue to access limitations, the BLM is currently negotiating with Louisiana Pacific Corporation as sole bidder for this contract. Should negotiations be satisfactorily concluded, then the BLM will award the contract to complete the forest treatments and timber sale." Louisiana-Pacific Corporation did not enter an appearance in this appeal.

On February 19, 1997, BLM issued its first EA on the proposed timber sale. Appellant, a neighboring landowner, filed a protest on March 12, 1997, objecting to the lack of a no-action alternative in the EA and questioning its conclusions related to the impact on wildlife. On May 27, 1997, BLM issued a revised EA, Finding of No Significant Impact and Decision Record (FONSI/DR). Also on May 27, 1997, Appellant received a letter, dated May 22, 1997, from the Acting Area Manager, who indicated that the first EA and DR had been withdrawn and a revised EA would issue, addressing Rahr's concerns. Appellant filed a second protest, asserting primarily that BLM had prevented him from additional participation and comment as the EA was revised. The Acting Area Manager denied this protest in the June 20, 1997, Decision and the July 2, 1997, clarification Decision here under appeal. Rahr filed a timely Notice of Appeal and Statement of Reasons (SOR) on August 4, 1997.

In his SOR, Appellant makes several allegations. First, he alleges that as a neighboring landowner with a demonstrated stake in bringing critical environmental information to the attention of the agency decision-maker, he was improperly excluded from the revised EA process. (SOR at 2.) Second, he claims that because BLM provided no real opportunity for public comment to specifically address the concerns presented in his protest, the May 27, 1997, FONSI/DR should be withdrawn and further environmental analysis be undertaken. Id. at 3. Finally, Appellant claims BLM also denied meaningful public participation by not responding to his questions, despite repeated requests, and by then claiming inaccurately that they had been answered in the June 20, 1997, Decision, which was subsequently clarified in the July 2, 1997, Decision. (SOR at 3.) The questions Appellant claims remain unanswered are:

> - When was the decision made to withdraw the decision record and to revise the environmental assessment?
>
> - Why did you fail to advise either Mr. Rahr or his attorney of that Decision?

- When was work initiated on the revised environmental assessment by the identified parties on the interdisciplinary team.

- Why did you choose to afford Mr. Rahr no further opportunity to comment upon the environmental assessment in the revised process; and

- Why does the revised environmental assessment make no mention of my letter to you of March 12th, 1997, detailing the concerns that Mr. Rahr had with regard to this timber sale?

In its Answer filed on September 15, 1997, BLM notes that 43 C.F.R. Part 5003 requires that interested and affected parties be given an opportunity to comment on the EA, the FONSI, and the Decision. The BLM states that Mr. Rahr had that opportunity and made comments. (Answer at 2.) Respondent BLM states that not only did Appellant make comments, but BLM responded to the comments, conducted further analysis, and updated the EA in consonance with 43 C.F.R. § 5003.3(d). (Answer at 3.) It (BLM) notes that the C.F.R. section provides that "[u]pon timely filing of a protest, the authorized officer shall reconsider the decision to be implemented in light of the statement of reasons for the protest and other pertinent information available to him/her." The BLM claims that while Rahr complains that it did not provide him with greater access and opportunity with the second EA, Appellant's real concern is that his personal position was not accepted by BLM. (Answer at 3.) The BLM explains there was no reason to obtain more factual information from the public, including Appellant, because the action was not complex nor was it controversial. Indeed, BLM claims, Appellant's protest to the revised EA and his SOR on appeal show that Rahr did not have any new information to provide to BLM. (Answer at 3.) Moreover, Respondent BLM states, the BLM protest regulations at 43 C.F.R. § 5003.3 provide the public with an adequate opportunity to comment, and thus comments provided by the public at this stage of the process meet the requirements of public participation under the National Environmental Policy Act of 1969 (NEPA). Id.

The BLM also responds to Appellant's claim that BLM lacked a scientific basis for its findings on wildlife, by noting that Rahr failed to provide a basis for his concerns, or any rebuttal to the BLM biologists findings that only wildlife values commonly found on other forested lands in western Montana were present in the Black Canyon area. (Answer at 3.) 1/

1/ In his Mar. 12, 1997, Protest, Appellant claims that in addition to the common species listed in the EA, cougar, ruffled and blue grouse, and black bears inhabit the North of Black Canyon area. No biological or other expert verification of this information was provided. However, these species are common to many areas of Montana.

With respect to the EA process, BLM explains that while Appellant complains about the short time between the notice received that the initial decision was withdrawn and the notice of a new decision, the process followed procedures and did not prevent the Area Manager from taking a hard look at necessary issues, nor did it prevent the public from participating in an acceptable environmental assessment process. Id. The BLM explains that during the time the authorized officer decided the proper way to address the protest comments, the interdisciplinary team reviewed the substantive issues. Respondent further explains that by the time the authorized officer concluded the EA needed further analysis, the team had examined the substantive issue comments in the protest SOR and other pertinent information and was prepared to make a new recommendation. (Answer at 3-4.) The result was a new EA with a no-action alternative and an administrative record again supporting the selective timber sale. Respondent claims the substantive comments in the protest had been reviewed, considered and addressed, and that neither the law nor regulation, nor specific facts require the Appellant be given more. (Answer at 4.)

With regard to Appellant's claim that BLM failed to provide immediate answers to five questions posed by Appellant's counsel, BLM responded that this argument is simply not true. (Answer at 4.) With respect to the first question, "When was the decision made to withdraw the decision record and to revise the environmental assessment?", BLM explains that the decision to withdraw the decision record is documented in a letter dated May 22, 1997. The BLM further states: "Obviously internal discussions involved a potential withdrawal, but the critical date is on the official document. The Appellant offers no reason why knowledge of a particular date will show that he was denied an opportunity to comment on a later document." (Answer at 4.)

In response to the second question, "Why did you fail to advise either Mr. Rahr or his attorney of that decision?", BLM responds that Appellant acknowledges that he was so advised in a letter from BLM dated May 22, 1997. (Answer at 4.) Further, BLM states:

> Apparently, the Appellant believes that it is critical to the NEPA process that he knows the date that the authorized officer determined to issue a decision withdrawing the record decision. Again, the Appellant fails to provide an argument, let alone prove by sufficient evidence, that such evidence would have provided him with a required opportunity to participate in the NEPA process and that he was denied such an opportunity.

(Answer at 4.)

The third question to which Appellant demands an answer is, "When was work initiated on the revised environmental assessment by the identified parties on the interdisciplinary team?" Respondent BLM first states that Appellant fails to provide any explanation as to why this question is relevant. (Answer at 4.) The BLM then states:

> Apparently, Appellant believes that BLM started the work on the update of the EA prior to the time that the authorized officer informed the Appellant that the initial EA and Decision Record was being withdrawn. The [a]dministrative record shows that the members of the interdisciplinary team for both Environmental Assessments are the same people. Nothing in the CEQ regulations nor the BLM NEPA Handbook prevents the same people from working on both Assessments, nor do either prevent these people from using factual information developed in the first EA when working on the updated EA. Again, Appellant fails to prove that the process denied him an opportunity to comment and thus prevented the authorized officer from having sufficient facts to take a hard look at the necessary environmental issues.

(Answer at 4-5.)

The fourth question to which Appellant seeks response asks, "Why did you choose to afford Mr. Rahr no further opportunity to comment upon the environmental [a]ssessment in the revised process?" The Respondent initially states that the administrative record shows that the issues identified were so simple and noncontroversial that there was no need for comments prior to decision. (Answer at 5.) Moreover, BLM states:

> Appellant's question implies that he has a right to participate with the interdisciplinary team in the fact gathering process. Never has a court determined that NEPA requires that the public be allowed such an opportunity. Even in an Environmental Impact Statement [EIS], the public participates during the preliminary scoping and then during draft EIS review. Never does the public join the team in preparing the facts for the authorized officer. In this case, BLM provided the Appellant with an adequate opportunity to comment on the action when they notified him of the opportunity to protest the decision.

(Answer at 5.)

Finally, Appellant asks, "Why does the revised environmental assessment make no mention of my letter to you of March 12th, 1997, detailing the concerns that of Mr. Rahr had with regard to the timber sale?" In response, BLM states that Appellant appears to have confused the need for a Federal agency to publish comments received during review of a draft EIS with the statement provided in an EA. (Answer at 5.) The BLM explains:

> An EA must contain a brief discussion of the need for the proposal, the alternatives, and a listing of the agencies and persons consulted. There is no requirement for the inclusion of public comments in the EA. The Appellant's comments are contained in the administrative record, which forms the basis for the authorized officer's decision.

(Answer at 5.)

[1] Compliance with NEPA requires that a Federal agency must consider its preferred course of action and alternatives to that action. See 40 C.F.R. § 1501.2(c); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989); In Re Suce Creek Timber Sale, 131 IBLA 206, 210 (1994); Southern Utah Wilderness Alliance, 122 IBLA 334, 338 (1992). The alternatives considered should be feasible and be reasonably related to the purpose of the proposed action; in other words, alternatives that can be accomplished and also fulfill the purpose sought to be achieved by the action. See 40 C.F.R. § 1502.14(a); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992).

The implementing regulations also require that a Federal agency must consider the potential cumulative impacts of a planned action together with other past, present, and reasonably foreseeable future actions. See 40 C.F.R. §§ 1508.7 and 1508.27(b); Fritiofson v. Alexander, 772 F.2d 1225, 1243-44 (5th Cir. 1985); G. John and Katherine M. Roush, 112 IBLA 293, 305 (1990).

The revised EA before us fully meets these criteria. In large measure, Appellant's objections to the revised EA appear to ignore the Great Falls Resource Area Manager's June 20, 1997, response to the protest. Stated in a light most favorable to Appellant, his criticisms merely indicate disagreement with the conclusions found in the EA. However, the Appellant must do more. He must present evidence supporting a finding that there was an error of law or of fact, or that BLM failed to consider a substantial environmental problem of material significance to the proposed action. Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). Appellant has failed to do this. In our review, we must ask whether the agency has taken a "hard look" at the problem when evaluating a FONSI and EA; that is, whether the agency has taken a searching realistic look at potential hazards, and whether it has candidly and methodically addressed these concerns. See Natural Resources Defense Council v. Herrington, 768 F.2d 1355 (D.C. Cir. 1985). Our study of the revised EA persuades us that this was what BLM did.

[2] We have repeatedly stated that an appellant is required to point out affirmatively why the decision under appeal is in error. In Re Mill Creek Salvage Timber Sale, 121 IBLA 360, 362 (1991); Andre C. Capella, 94 IBLA 181 (1986); United States v. De Fisher, 92 IBLA 226 (1986). In Shell Offshore, Inc., 116 IBLA 246, 250 (1990), we held that this requirement is not satisfied if the appellant "has merely reiterated the arguments considered by the [decisionmaker below], as if there were no decision * * * addressing these points." The BLM has provided a comprehensive Decision fully addressing the allegations contained in the protest, and Appellant has not attempted to show any substantive error in the Decision. Rather, Appellant now claims that the revised EA must be reconsidered because he was not provided an opportunity to comment on the revised EA. It was as a result of his comments, however, that the EA was revised to consider his specific concerns.

A consistent thread running throughout Appellant's submissions is the expressed belief that the EA process inadequately considered the impacts of the selective cut on the wildlife resources in the area. Yet when the specifics of his allegations are examined, what is revealed is not a failure of the EA process to consider the wildlife impacts, but a disagreement between this Appellant and the authors of the EA as to what those impacts are expected to be.

We recognize, of course, that the mere fact that the revised EA considered the impact of the selective cut on wildlife resources does not establish that its conclusions are correct. But if Appellant wishes to challenge the revised EA on this point, he must affirmatively show in what manner the EA's conclusions are erroneous. Rather than providing this Board with specifics as to the alleged deficiencies of the conclusion reached, Rahr merely asserts that harm would come to wildlife resources in the area. There is no indication that other than common species would be impacted and no showing that this impact would be disproportionate to the value gained in reducing the canopy, allowing other new species to flourish, and giving the soil an opportunity for reconstitution.

It is not enough for an appellant to merely assert in conclusory terms that an EA inadequately considered the effects of the proposed action on wildlife resources. Rather, an appellant must provide some basis in fact to support this assertion. See, e.g., Hoosier Environmental Council, 109 IBLA 160, 168 (1989); In re Lick Gulch Timber Sale, 72 IBLA 261, 311-313, 90 I.D. 189, 217-18 (1983). This, Appellant has simply failed to do. Appellant's references to negative wildlife impacts are lacking in specificity with regard to species occurrence and are totally unaccompanied by any evidence that might support the assertion that BLM erred in its conclusion that the proposed selective cut would have no significant impact on the wildlife values within the North of Black Canyon Area.

Finally, we address the Appellant's claim that the revised EA must be rejected because he was given insufficient opportunity to comment. As a result of Appellant's comments, the original EA was redrafted and his specific concerns were addressed. A new "no-action" alternative was added at his specific request. We specifically find that the regulations at 43 C.F.R. Part 5003 requiring that interested and affected parties be given an opportunity to comment on the EA, the FONSI, and the Decision have been met. We further find that BLM not only solicited Appellant's comments, but responded to those comments by conducting further analysis and by revising the EA in accord with the requirements of 43 C.F.R. § 5003.3(d). Moreover, we find that the BLM protest regulations at 43 C.F.R. § 5003.3 provide the public with an adequate opportunity to comment, and comments provided by the Appellants and other members of the public at this stage of the process meet the requirements of public participation under NEPA. See 42 U.S.C. § 4332.

We have reviewed the record in this case, including the EA, the revised EA, the Appellant's protests, BLM's June 20, 1997, and July 2,

1997, Decisions, Rahr's SOR and BLM's Answer, as well as all other pertinent documents, and we agree with BLM's disposition of the issues raised by Appellant.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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James P. Terry
Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge